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Transit of Straits and Archipelagic Waters by Military Aircraft

Bernard H Oxman*

The UN Convention on the Law of the Sea balances the interests of states in ways that are more refined than the classic *summa divisio* between the free high seas and territorial waters. The result for aviation is the preservation of freedom of overflight for civil and military aircraft seaward of the territorial sea in the exclusive economic zone as on the high seas beyond, and the right of such aircraft to transit archipelagic waters as well as straits comprised of territorial seas and internal waters. A proper understanding of the scope of these rights and their relationship to the UN Charter and the Chicago Convention on International Civil Aviation is of considerable importance to international peace and security and global communications.

I. INTRODUCTION

SOME two-thirds of the earth's surface is covered by water. Since time immemorial, the seas have been a principal avenue for trade and communications, both within and between regions. In an increasingly interdependent world, the right to communicate is one of the most important attributes of sovereignty and one of the indispensable elements of both international security and economic development. It is important to bear this in mind in a context where the word 'sovereignty' is often used to refer only to territory.

Navigation on or under the sea requires craft specially built for this purpose. Ships are generally unable to operate on land. Their capacity to move from one place to another requires that they follow the sea and negotiate the narrow passages between open seas.

The same is true of aircraft whose mission it is to travel with ships, for example to provide air cover for a naval task force. But apart from that situation, air navigation is not subject to geographic constraints to the same degree as ships. Aircraft are generally able to fly over sea and land. Overflight is, however, subject to legal and political

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constraints. Where aircraft lack the right to fly over the territory of states en route to their destination, and are unable to obtain special permission to do so, their only option is to fly over the sea. Thus, they too may be compelled to follow the sea and negotiate the narrow passages between open seas.

This difference is important in understanding and applying the regimes applicable to overflight at sea. For most aircraft, direct point-to-point routes over land and sea are the norm. Aircraft are most likely to divert their routes and remain over the sea when, for legal or political reasons, they have no better alternative. Accordingly, the question of the rights of states to control or regulate overflight of areas off the coast arises in a particularly sensitive context: offshore routes in the vicinity of the coast are most likely to be needed in situations where those states are least likely to allow flight over their territory for political reasons. Military overflight in periods of political tension is one example.¹

II. THE CHARTER OF THE UNITED NATIONS

Whatever the rights of states with respect to overflight, they are subject to the provisions of the United Nations Charter. Article 103 of the Charter provides that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the Charter prevail.

Article 2, paragraph 4, of the United Nations Charter requires that states 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' This applies both to the state exercising overflight rights and to other states, including the state whose territory is being overflown. In the latter regard, it should be evident that the right to communicate is a basic component of the political independence of

1 See John Norton Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea', (1980) 74 *AJIL* 77, 84. Moore's article responds to the critique in Michael Reisman, 'The Regime of Straits and National Security: An Appraisal of International Lawmaking', (1980) 74 *AJIL* 48. Attempts by others to rely on Reisman's critique as support for restrictions on navigation and overflight misunderstand the article: 'An acceptable public order of the oceans as it pertains to security should provide for wide surface and aerial access and rights of submerged passage as unconditionally as possible'. *Ibid*, at 53.

a state.² Indeed, under classic international law, obstruction of that right might constitute a *causus belli*.

Article 51 provides that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs.'³ This too applies both to the state exercising overflight rights and to other states, including the state whose territory is being overflown. In the context of the present analysis, it provides the legal basis for a state to take action in self-defence either against⁴ or to protect⁵ aircraft in flight.

Pursuant to article 25 (as well as other provisions) of the Charter, members of the United Nations are bound to 'accept and carry out the decisions of the Security Council in accordance with the present Charter.' Under article 39, the Security Council has the power to 'determine the existence of any threat to the peace, breach of the peace, or act

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- 2 In a case brought by Spain against Canada for seizing a Spanish fishing vessel on the high seas, Spain alleged, among other things, that Canada thereby engaged in an unlawful use of force and argued that the dispute therefore did not come within the terms of Canada's reservation to the jurisdiction of the International Court of Justice regarding 'disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.' For its part, Canada sought to distinguish between enforcement of fisheries laws and the use of force under the Charter. Because it found that the Canadian reservation applied without regard to the legality of the actions contemplated thereby, the Court decided that it lacked jurisdiction over the case and did not pass on the merits of Spain's allegations or the legality of Canada's actions. *Fisheries Jurisdiction (Spain v Canada)*, Dec 4, 1998 (Jurisdiction) <<http://www.icj-cij.org>>.
 - 3 Article 51 specifies that this does 'not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'. In addition to the Charter, the rules of customary international law also apply, including the requirements of necessity and proportionality.
 - 4 ICAO has developed detailed standards and recommended practices regarding the interception of civil aircraft, and has adopted a new article 3 *bis* of the Chicago Convention, *infra* note 9, prohibiting the use of weapons against civil aircraft in flight (which has been widely ratified but is not yet in force). These rules do not apply to the interception of military aircraft. They nevertheless may supply useful guidance in situations where some purpose other than self-defence is the object of the interception or where the law of self-defence would itself limit the use of weapons.
 - 5 Thus, for example, article 6 of the NATO Treaty provides that an armed attack on one or more of the Parties is deemed to include an armed attack on the 'aircraft of any of the Parties' when over the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer. North Atlantic Treaty, Apr 4, 1949, art 6, 34 *UNTS* 243.

of aggression' and may either make recommendations or 'decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' Article 41 deals with measures not involving the use of armed force, which may include 'complete or partial interruption of ... air ... communication.' Article 42 deals with 'action by air, sea, or land forces', which may include 'demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.' Pursuant to these provisions, the Security Council may make, and indeed has made, decisions to interrupt air communication and to authorize forces of UN members to carry out its decisions.

III. THE RECEIVED REGIMES

Well before the twentieth century, it was already clear that customary international law distinguished between the land and the sea. In this connection, although he doubtless was not addressing questions of international law, it is interesting to ponder the celebrated lines from Byron's poem *Childe Harold*:

*Roll on, thou deep and dark blue ocean-roll!
Ten thousand fleets sweep over thee in vain;
Man marks the earth with ruin-his control
Stops with the shore.*

In general, land areas were subject to the acquisition of national sovereignty. With respect to *terra nullius*, such sovereignty could be acquired by effective occupation. On the other hand, the sea was open to use by all and could not be subjected to claims of sovereignty, including claims based on effective occupation.⁶ A limited exception was eventually made for a narrow band of sea adjacent to the coast that came to be known as the territorial sea, classically regarded as extending one marine league (three nautical miles) from the coast.⁷ At the same time, little attention was devoted to the status of air space,

6 Prescriptive claims to 'historic' waters are relatively rare and require an affirmative showing of continuing control acquiesced in by other states.

7 Stating that 'when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion,' the Supreme Court of the United States concludes that the colonies did not have a territorial sea at the time of the Declaration of Independence in 1776, and traces the history of the emergence of the US 3-mile claim in a note to the British minister in 1793 by the first US Secretary of State, Thomas Jefferson, and the general acceptance of the 3-mile belt 'throughout the world'. *United States v California*, 332 U.S. 19, 32-33 (1946).

although some legal questions were posed by the use of balloons and, well before this, some theorists opined that rights of sovereignty or property extended up to the heavens.

Once powered flight appeared in the early twentieth century, the view quickly took hold that under international law 'airspace is part of the legal régime of the subjacent territory'.⁸ From this perspective, the law of the land would determine the regime of airspace above the land, and the law of the sea would determine the regime of airspace above the sea. The application of this approach is evident in the major conventions on the subject.

The 1944 Convention on International Civil Aviation⁹ (Chicago Convention) provides:

Article 1

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.

Article 12

Each contracting State undertakes to adopt measures to insure that ... every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.

8 This view was expressed by the sub-committee responsible for drafting the Paris Convention for the Regulation of Aerial Navigation, 1919, 11 *LNTS* 173. See Nicholas Grief, *Public International Law in the Airspace of the High Seas* (Dordrecht/Boston: Martinus Nijhoff, 1994), p 53 & note 42 citing JC Cooper, *Explorations in Aerospace Law*, (1968), at 197. It should be noted that, insofar as aviation is concerned, this approach generally did not prevail with respect to private property rights under municipal law: aviation constitutes a notable qualification of the maxim that property rights extend *usque ad coelum*.

9 Convention on International Civil Aviation, Dec 7, 1944, 15 *UNTS* 295 (hereinafter Chicago Convention). Art 1 of the 1919 Paris Convention for the Regulation of Aerial Navigation provided, 'The Contracting States recognise that every State has complete and exclusive sovereignty in the airspace above its territory and territorial waters.' 11 *LNTS* 173.

... Over the high seas, the rules in force shall be those established under this Convention.¹⁰

The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone¹¹ provides, 'The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.' The 1958 Geneva Convention on the High Seas¹² provides that the 'high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty' and expressly identifies '[f]reedom to fly over the high seas' as one of the freedoms of the high seas. These provisions are substantially repeated in the 1982 United Nations Convention on the Law of the Sea¹³ (Law of the Sea Convention). Selected provisions of the Law of the Sea Convention are appended to this paper for ease of reference and context.

The sovereignty of the coastal state over the territorial sea is, and has long been, subject to a right of innocent passage for ships of all states.¹⁴ It would seem, therefore, that if the underlying principle is that 'airspace is part of the legal régime of the subjacent territory',¹⁵ it might be logical to extend the right of innocent passage to aircraft over the territorial sea. No such provision was made either in the 1944 Chicago Convention or, well before that, in the 1919 Paris Convention.¹⁶ The absence of such provision in these conventions had a decisive impact on state practice and on the International Law Commission in drafting the provisions ultimately incorporated into the Territorial Sea Convention.

10 This is a reference to the power of the ICAO Council, under Art 54(f), to adopt international standards in accordance with Chapter VI of the Convention.

11 Art 2, Apr 29, 1958, 516 *UNTS* 205 (hereinafter Territorial Sea Convention).

12 Art 2, Apr 29, 1958, 450 *UNTS* 82.

13 United Nations Convention on the Law of the Sea, *opened for signature* Dec 10, 1982, arts 2, 87 & 89, 1833 *UNTS* 397 (hereinafter Law of the Sea Convention). Art 87's list of high seas freedoms refers to 'freedom of overflight' rather than 'freedom to fly over the high seas'. The change in drafting is not substantive; it does however tend to reinforce the underlying view that the regime of the relevant airspace is part of the regime of the high seas.

14 See, *eg*, Territorial Sea Convention, *supra* note 11, art 14; Law of the Sea Convention, *supra* note 13, art 17.

15 See *supra* note 8.

16 See *supra* note 9. Art 2 of the 1919 Paris Convention did however provide, both with respect to land territory and territorial waters, that each party 'undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States'. This did not apply to state aircraft (arts 32 & 33), to aircraft carrying arms and munitions of war (art 26), or to third states (art 5), and was subject to other restrictions and unilateral regulations (*eg*, arts 2, 3, 15, 27, 28).

In effect, by the 1950s the Chicago Convention was sufficiently widely accepted to suggest that the regime of the air was no longer entirely derivative, but itself influenced the codification and progressive development of the law of the sea. This is evident not only in the fact that the International Law Commission in the 1950s made no provision for a right of innocent passage for aircraft, but in the fact that the articles it drafted that became part of the High Seas Convention do not regulate freedom of overflight with anything approaching the detail used with respect to freedom of navigation by ships.

It is often said that security concerns explain why aircraft were not accorded a right of innocent passage over the territorial sea, particularly in light of the fact that the Chicago Convention and the Paris Convention were both negotiated in the context of World Wars. It also may be that the practical need to stay close to the coast for navigation or safety reasons was generally more of a concern with respect to ships than aircraft. Moreover, to the extent that there is a right for civil aircraft not engaged in scheduled international air services to fly over the land territory of a state under the Chicago Convention, that right extends to its territorial waters as well.¹⁷

Be that as it may, it is important to bear in mind the underlying assumptions regarding the legal geography of the sea. In 1919, in 1944, and even in 1958, the principal maritime and aviation powers generally assumed a maximum limit of three nautical miles for the territorial sea.¹⁸ If, in light of the 1951 decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case, the maritime powers also accepted the possibility of further extensions of sovereignty through straight baselines in certain areas,¹⁹ they did not regard such rules as extending to vast archipelagoes lying astride major international routes.

Those who are familiar with the history of the Third UN Conference on the Law of the Sea might be surprised to learn that the United States evidenced scant interest in liberalizing the regime of innocent passage in the territorial sea, including straits, in its comments to the International Law Commission in the 1950s and its approach at the 1958 Geneva Conference. At that time, it assumed an immutable three-mile position regarding the breadth of the territorial sea.

17 See Chicago Convention, *supra* note 9, art 5. In addition, scheduled services are the object of an elaborate network of bilateral agreements.

18 Those, like the Soviet Union, that already claimed and recognized a 12-mile territorial sea at times also implied that a different legal regime applied to international straits.

19 See Territorial Sea Convention, *supra* note 11, arts 4, 5(2); Law of the Sea Convention, *supra* note 13, arts 7, 8(2).

In brief, the concessions to territorial sovereignty at sea in the Chicago Convention were believed to apply to a very narrow band along the coast. The rest was assumed to be free 'high seas' subject to regulation only by the ICAO Council binding only on civil aircraft. With the notable exceptions of the Singapore and Sunda Straits and the Strait of Tiran, most international straits were wider than six miles and accordingly had high seas running through them if one assumed a maximum territorial sea of three miles. The idea of sovereignty over vast archipelagic waters was not considered in 1944, and was not accepted at the 1958 Conference.

Moreover, in 1919, and even in 1944, much of the world's coast outside the Western Hemisphere was under the control of European powers who were themselves principal maritime and aviation powers. There is little evidence that the implications for the law of the sea and the law of the air of the vast decolonization to come were taken into account by those who drafted the Chicago Convention or, it might be said, by those who drafted the 1958 Geneva Conventions in the midst of that process. It should be noted in this regard that roughly twice the number of states attended the Third UN Conference on the Law of the Sea from 1973 to 1982 as attended the Geneva Conference in 1958; even fewer had significant influence over the draft articles for the 1958 Conference submitted by the International Law Commission in 1956 after several years of work.

IV. THE CHICAGO CONVENTION

Under article 1 of the Chicago Convention, 'every State has complete and exclusive sovereignty over the airspace above its territory.' Article 2 defines territory as 'land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.'

Although the Chicago Convention states that it is not applicable to state aircraft, its provisions in this regard are more complex, and bear repetition:

Article 3

- (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.
- (b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.
- (c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

- (d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Thus, while its other provisions, including those concerning international standards and national regulation, do not apply to military and other state aircraft, the Chicago Convention: (i) imposes an obligation on the state of registry to require their state aircraft to have due regard for the safety of navigation of civil aircraft, and (ii) requires consent for the overflight by state aircraft of the territorial waters of another state.²⁰

With respect to overflight of the territory (including territorial waters) of a state by civil aircraft, the Chicago Convention expressly requires consent for scheduled international air service²¹ and for overflight without a pilot,²² but grants a limited right to 'aircraft not engaged in scheduled international air services ... to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.'²³ However, the state flown over may prescribe routes or require permission for such flights 'over regions which are inaccessible or without adequate air navigation facilities.'²⁴ Moreover, the state flown over may 'for reasons of military necessity or public safety' establish 'prohibited areas ... of reasonable extent and location.'²⁵ It also may, 'with immediate effect, temporarily ... restrict or prohibit flying over the whole or any part of its territory.'²⁶

With respect to regulation of overflight by civil aircraft, article 12 of the Chicago Convention imposes an obligation to 'comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.' As previously noted, '[o]ver the high seas, the rules in force shall be those established under this Convention,' that is to

20 As a strictly textual matter, it might be argued that art 2 of the Chicago Convention, *supra* note 9, does not apply to state aircraft by virtue of art 3(a). The argument would have difficulty surviving what my colleague Michael Graham cheerfully calls 'the giggle test.' Art 2 defines a term that is used in a provision of the very next article that does apply to state aircraft, namely art 3(c).

21 Chicago Convention, *supra* note 9, art 6.

22 Chicago Convention, *supra* note 9, art 8.

23 Chicago Convention, *supra* note 9, art 5.

24 *Ibid.*

25 Chicago Convention, *supra* note 9, art 9(a).

26 Chicago Convention, *supra* note 9, art 9(b).

say those adopted by the ICAO Council pursuant to articles 37 and 54(I).²⁷ They are to be found in the Rules of the Air, Annex 2 to the Convention.

However, over its territory and territorial sea, a state is not strictly required to apply the Rules of the Air. Under article 12, it is obliged 'to keep its own regulations in these respects uniform, *to the greatest possible extent*, with those established from time to time under this Convention.'²⁸ In this connection, article 38 requires a state to give ICAO 'immediate notification ... of the differences between its own practice and that established by [an] international standard.'

V. RENEGOTIATING THE LAW OF THE SEA

In general, it is reasonable to conclude that the received law of the sea that formed the basis for the 1958 Conventions accommodated coastal and non-coastal interests by the use of a *summa divisio*: the line between the territorial sea and the high seas. As illustrated clearly in the Chicago Convention itself, on one side the coastal state has substantial and often complete control. On the other side, it has none.

However, in fact this received law was more refined than the Chicago Convention suggests. Within the territorial sea, ships enjoyed a right of innocent passage. Seaward of the territorial sea, the 1958 Conventions accorded the coastal state limited enforcement rights for such matters as smuggling and immigration control in a contiguous zone extending up to 12 miles from the coastal baselines, and rights in a much broader area over exploration of the seabed and subsoil of the continental shelf and exploitation of its natural resources.

The approach of the Third UN Conference on the Law of the Sea was substantially more refined. While the regimes of the territorial sea and the high seas are retained in the 1982 Law of the Sea Convention, they are far from the whole story: new regimes are added to moderate their effect both landward and seaward of the outer limit of the territorial sea, and new environmental obligations are imposed on all of the sea.

In general these changes greatly expand coastal state control over the sea but, at the same time, preserve to a very considerable extent (and in some instances expand) the communications rights and free-

27 Art 37(c) refers explicitly to 'Rules of the air and air traffic control practices'.

28 Emphasis added. In addition, art 37 provides: 'Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft ... in all matters in which such uniformity will facilitate and improve air navigation.'

doms enjoyed under the previously received regimes. This includes rights and freedoms of overflight. To put the matter as clearly and unambiguously as possible, a consensus on the rules regarding traditional uses of the sea set forth in the Law of the Sea Convention, and its subsequent widespread ratification, simply would not have occurred if the effect were to radically reduce the areas in which all states enjoy navigation and overflight rights and freedoms without the need for obtaining the consent of the coastal state and without unilateral regulation by that state.

From the perspective of overflight rights and freedoms, there are four significant developments in the Law of the Sea Convention:

- (i) in Part II, it establishes a maximum permissible breadth of twelve nautical miles from the coastal baselines for the territorial sea;²⁹
- (ii) in Part V and related provisions, it elaborates a new regime of the exclusive economic zone seaward of the territorial sea extending up to 200 nautical miles from the coastal baselines;³⁰
- (iii) in Part III and related provisions, it deals with the regime of straits overlapped by territorial seas (and certain internal waters) separately from the regime of the territorial sea in Part II and establishes a new regime of transit passage for most straits used for international navigation;³¹
- (iv) in Part IV and related provisions, it elaborates a new regime of archipelagic waters enclosed by archipelagic baselines from which the breadth of the territorial sea is measured, and deals separately with the regime of passage through archipelagic waters and the adjacent territorial sea.³²

They will be addressed first in the context of the references to territorial waters in the Chicago Convention, and then in the context of its references to the high seas.

29 Law of the Sea Convention, *supra* note 13, art 3.

30 Law of the Sea Convention, *supra* note 13, Part V.

31 Law of the Sea Convention, *supra* note 13, Part III. 'The 1982 Convention ... makes it very clear that passage through straits used for international navigation is to be governed solely by Part III, and not by Part II.' Hugo Caminos, 'The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea', (1987-V) 205 *Rec Cours* 9, 123 (hereinafter referred to as Caminos).

32 Law of the Sea Convention, *supra* note 13, Part IV.

A. Territorial Waters under the Chicago Convention

The Law of the Sea Convention has two effects on article 2 of the Chicago Convention.³³ First, it clarifies the geographic meaning of the reference to 'territorial waters'. Second, it qualifies the assimilation of territorial waters to land territory in the context of overflight of straits and archipelagic waters and, to that extent, clarifies the functional meaning of the reference to 'territorial waters'.

(i) *The Territorial Sea, Internal Waters and Archipelagic Waters*

As to the geographic meaning of 'territorial waters' in the context of the reference to 'land areas and territorial waters adjacent thereto' in article 2 of the Chicago Convention, the term logically embraces not only the territorial sea but waters landward of the baselines from which the territorial sea is measured, long denominated internal waters and now denominated either internal waters or archipelagic waters. Article 2 of the Law of the Sea Convention provides in pertinent part:

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Excluding waters landward of the baselines would make no sense since, under the Chicago Convention, the same regime applies both seaward and landward of those waters. As a textual matter, given the choice between regarding such waters as either territorial waters or land areas under article 2, it is certainly more plausible to regard them as territorial waters, particularly in light of the vast expanse of some archipelagic waters.

Because it is now clear that the territorial sea may not extend seaward of 12 nautical miles from baselines established in accordance with the Law of the Sea Convention, it should be equally clear that 'territorial waters' referred to in article 2 of the Chicago Convention also cannot extend seaward of that limit.

(ii) *The Exclusive Economic Zone*

To the extent that any question might be raised on this point, it would presumably relate to the regime of the exclusive economic zone.³⁴ In this context, it should be borne in mind that the term 'territorial

³³ The text accompanies note 9 *supra*.

³⁴ In areas of straits beyond the territorial sea, the regime of the high seas or the exclusive economic zone would apply. See *infra* note 38 and accompanying text.

waters' is defined as part of the territory of a state by article 2 of the Chicago Convention, and pursuant to article 1 of that Convention refers to an area where 'every State has complete and exclusive sovereignty over the airspace.' That simply does not describe the exclusive economic zone regime elaborated by Part V of the Law of the Sea Convention. Article 58(1) expressly accords all states freedom of navigation and overflight in the exclusive economic zone. The exclusive economic zone 'is an area beyond ... the territorial sea.'³⁵ While the coastal state enjoys enumerated sovereign rights and jurisdiction for resource management and other specific purposes, it is not accorded sovereignty in the exclusive economic zone.³⁶ Quite to the contrary, the prohibition on claims of sovereignty in article 89 applies to the exclusive economic zone pursuant to article 58(2). There is no need to belabor the point further.³⁷

(iii) *Transit Passage of Straits*

The provisions of the Law of the Sea Convention regarding straits unquestionably affect waters subject to the sovereignty of the coastal state. That is their purpose. Indeed, the entire Part of the Convention dealing with straits used for international navigation 'does not apply ... if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.'³⁸

Article 34 of the Law of the Sea Convention specifies that the 'regime of passage through straits used for international navigation ... shall

35 Law of the Sea Convention, *supra* note 13, art 55.

36 See Law of the Sea Convention, *supra* note 13, arts 55-58. Art 59 leaves to *ad hoc* determination the question of whether the right to conduct and control a particular activity not specifically allocated by the Convention will be enjoyed by the coastal state or by all states.

37 Art 2 of the Chicago Convention, drafted before the massive decolonization that began after World War II, provides that 'the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.' The words 'suzerainty, protection or mandate' refer to the status of the land areas and the territorial waters adjacent thereto, not to the status of the waters alone. Those words largely reflect the legal classifications a colonial system that has passed. They have nothing whatever to do with the status of the exclusive economic zone.

38 Law of the Sea Convention, *supra* note 13, art 36. Art 35 provides, 'Nothing in this Part [Part III, Straits Used for International Navigation] affects ... the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas.'

not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.' 'In other respects' waters within the baselines retain their status as internal waters, and waters seaward of the baselines, up to a maximum limit of 12 nautical miles, retain their status as territorial sea. But the key words are 'in other respects'. The regime of passage through such straits does affect their legal status with respect to passage itself. As article 34 goes on to explain, the 'sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.'

Section 2 of Part III of the Law of the Sea Convention elaborates a new right of transit passage enjoyed by 'all ships and aircraft'³⁹ in 'straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.'⁴⁰ Transit passage is defined as 'the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait ...'⁴¹ States bordering straits may not hamper or suspend transit passage.⁴²

It is evident that the air space over the territorial sea or internal waters⁴³ in straits in which there is a right of transit passage is not, in the words of article 1 of the Chicago Convention, subject to the 'complete and exclusive sovereignty' of the coastal state. In the words of article 2 of that Convention, such straits are not 'under the sovereignty' of the coastal state '[f]or the purposes of this Convention'

39 This expressly includes state aircraft. Law of the Sea Convention, *supra* note 13, art 39(3)(a).

40 Law of the Sea Convention, *supra* note 13, arts 37-38. This does not affect the legal regime in straits in which passage is regulated by long-standing international conventions specifically relating to such straits (such as the Turkish Straits). *Ibid*, art 35(c). The regime of passage in certain straits between an island and the mainland where there is a route of similar convenience seaward of the territorial sea of the island, and in straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state, is limited to non-suspendable innocent passage for ships. *Ibid*, arts 38(1), 45.

41 Law of the Sea Convention, *supra* note 13, art 38(2).

42 Law of the Sea Convention, *supra* note 13, art 44.

43 The regime of straits used for international navigation extends to internal waters not previously considered as such that are created by a system of straight baselines. Law of the Sea Convention, *supra* note 13, art 35(a). The same result applies to the regime of innocent passage outside such straits. *Ibid*, art 8(2).

insofar as international aviation in transit passage through such straits is concerned. Moreover, it should not be forgotten that most of the affected straits had high seas running through them with a maximum limit of three miles for the territorial sea (ordinarily measured from the coast itself) that was widely assumed in 1944 when the Chicago Convention was concluded. Thus, the regime of transit passage preserves to a significant degree the anticipated legal effect of articles 1 and 2 of the Chicago Convention at the time it was negotiated. In addition, it is clear that the Chicago Convention did not seek to determine the underlying legal status of the sea and the airspace above the sea. It relied on the law of the sea to do so.

The most appropriate means for reconciling the two Conventions is to interpret the words 'territorial waters' in article 2 as not applying to straits used for international navigation with respect to the exercise of the right of transit passage. The words would however apply to other flights over such straits. Alternatively, one can of course reach the same result by applying the 'later in time' rule articulated in article 30 of the Vienna Convention on the Law of Treaties. But application of that rule itself turns on compatibility of the provisions of the earlier treaty with the later one. Viewed only in the context of the Chicago Convention, the Law of the Sea Convention would itself constitute the authorization required by article 3(c) of the Chicago Convention (and comparable provisions regarding civil aircraft) and the exclusive source of the relevant obligations during transit. That approach, however, does not reflect fully the role of the Law of the Sea Convention as the basic organizing instrument of public international law for the sea that has been aptly called a Constitution for the Oceans.⁴⁴ It would seem to make most sense to interpret the Chicago Convention in a manner compatible with the Law of the Sea Convention, in particular because the latter Convention is both widely ratified⁴⁵ and widely regarded as generally declaratory of the customary international law of the sea.⁴⁶

44 Tommy TB Koh, *A Constitution for the Oceans*, UN Pub Sales No E 83 V 5, p xxxiii (1983) (immediately preceding the text of the Law of the Sea Convention as originally published by the United Nations).

45 There were 135 parties listed by the UN web site on April 23 2001. <<http://www.un.org/Depts/los>>.

46 'The sources of international air law – in particular the Convention on International Civil Aviation and the Annexes thereto as well as other international air law instruments – frequently refer or are applicable to the airspace above different areas of the sea; however, these instruments do not define the terms of the international law of the sea but take the basic concepts of the law of the sea from general international law'. ICAO Secretariat, United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago

(iv) *Archipelagic Sea Lanes Passage*

Part IV of the Law of the Sea Convention provides both for the sovereignty of the archipelagic state over a new category of waters called 'archipelagic waters' and for limitations on the exercise of that sovereignty, including a new 'right of archipelagic sea lanes passage' for 'all ships and aircraft'. Most of the relevant provisions governing transit passage of straits are either copied or incorporated by reference into the provisions regarding archipelagic sea lanes passage. For the same reasons discussed in connection with transit passage of straits, it would make sense to interpret the words 'territorial waters' in article 2 of the Chicago Convention as not applying to archipelagic waters and the adjacent territorial sea with respect to the exercise of the right of archipelagic sea lanes passage through such waters, be it through sea lanes and air routes designated for this purpose or, in their absence, through routes normally used for international navigation.⁴⁷ The words 'territorial waters' in article 2 would however apply to other flights over archipelagic waters and the adjacent territorial sea, including sea lanes and air routes.

It may be noted that transit passage is defined as 'freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait' while archipelagic sea lanes passage is defined as 'the exercise ... of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit' between points outside archipelagic waters and the adjacent territorial sea.⁴⁸ This difference is of no consequence in the present context. Given the fact that there may be several sea lanes and air routes through a given archipelago, and that each of the sea lanes and air routes may in effect be up to 50 nautical miles wide,⁴⁹ archipelagic states such as Indonesia – whose interest in the

Convention, its Annexes and other International Air Law Instruments, Attachment to State letter LE 4/41 – 84/33, para 2.1 (1984), ICAO doc C-WP/7777 (1084, mimeo.), reproduced as LC/26-WP/5-1 (1985, mimeo), in (1987) 3 *NILOS YB* 243 (hereinafter ICAO Secretariat Study). Much of the study reflects the analysis by Michael Milde in his article, 'United Nations Convention on the Law of the Sea – Possible Implications for International Air Law', (1983) 8 *Annals of Air & Space L* 167 (hereinafter cited as Milde).

47 See Law of the Sea Convention, *supra* note 13, art 53. Where relevant, presumably the same result would apply to the preservation of 'existing rights and all other legitimate interests' of an immediately adjacent neighboring state parts of whose territory is separated by the archipelagic waters of its neighbor. See *ibid*, art 47(6).

48 Law of the Sea Convention, *supra* note 13, arts 38(2), 53(3).

49 See Law of the Sea Convention, *supra* note 13, art 53(5).

concept related in important respects to enhancing national unity – were uncomfortable with the possible political implications of using the word ‘freedom’ to describe a regime applicable to vast areas within and, of necessity, fully dividing the archipelago. For their part, certain maritime powers such as the United States regarded the inclusion not only of the word ‘unobstructed’ but of the clause ‘in the normal mode’ in the definition of the right itself rather than, as in straits, in the context of a flag state obligation)⁵⁰ as an important reminder regarding the operation of naval task forces employing defensive screens, evasive tactics, air cover and submerged submarines through the vast areas involved.⁵¹

(v) *Result*

The result then is that the provisions of the Chicago Convention and related instruments that apply only to the territory of a state (including its territorial waters) do not apply seaward of the territorial sea and do not apply to transit passage of straits or to archipelagic sea lanes passage.

For state aircraft, the effect is relatively simple. The need for authorization to fly over the territory of another State under article 3(c) of the Chicago Convention does not apply beyond the territorial sea or to transit passage or archipelagic sea lanes passage. On the other hand, the obligation of due regard for the safety of navigation of civil aircraft under article 3(d) of the Chicago Convention does apply: it is not limited to overflight of foreign territory and is compatible with the Law of the Sea Convention, including the obligation at all times to operate with due regard for the safety of navigation under articles 39(3) and 54 thereof. Similarly, the statement in article 3(a) that the Chicago Convention is not applicable to state aircraft applies: it as well is not limited to overflight of foreign territory and is not only compatible with the Law of the Sea Convention but is reflected in the drafting of article 39(3) thereof.

For civil aircraft, the effect is somewhat more complex because the Chicago Convention does apply to them. The approach however is the same. Provisions of the Chicago Convention and related instruments that apply only to the territory of a state (including its territorial waters) do not apply to civil aircraft beyond the territorial sea or in

50 See Law of the Sea Convention, *supra* note 13, arts 39(1)(c), 54.

51 See *infra* note 83 and accompanying text. This question is analyzed by the author in Bernard H Oxman, ‘The Third United Nations Conference on the Law of the Sea: the 1966 New York Session’, (1978) 72 *AJIL* 57, 66.

transit passage of straits or archipelagic sea lanes passage. Thus, for example, the provisions regarding prohibited areas and temporary restrictions on overflight under article 9 of the Chicago Convention would not apply. Similarly the requirement in article 6 for authorization for scheduled international air service would not apply.

The question then is which provisions and regulations apply. This brings us back to article 12 of the Chicago Convention and its reference to the 'high seas' as well as to the requirement of articles 39(3) and 54 of the Law of the Sea Convention that civil aircraft in transit passage or archipelagic sea lanes passage shall observe the ICAO Rules of the Air and that state aircraft in transit passage or archipelagic sea lanes passage will normally comply with such safety measures.

B. The High Seas under the Chicago Convention

The basic question posed is whether the provisions of the Chicago Convention, as they apply on the high seas, are applicable to freedom of overflight in the exclusive economic zone, transit passage of straits and archipelagic sea lanes passage.

(i) The Exclusive Economic Zone

The Law of the Sea Convention does not limit freedom of overflight to transit either in the exclusive economic zone or on the high seas beyond. This freedom is however both protected and limited by the duty set forth in article 87 to exercise high seas freedoms with due regard to the exercise by other states of their high seas freedoms; that duty is integral to a public order rooted in universal freedoms and is incorporated into the regime of the exclusive economic zone by necessary implication reinforced by the express cross-reference in article 58(1) to freedoms 'referred to in article 87'. Any state, including the coastal state, may be either the subject or object of that duty in the exclusive economic zone.

Insofar as activities other than (or in addition to) overflight are concerned, while the issue is unlikely to arise very often, it may be assumed that aircraft, like ships, must respect the rights of the coastal state in the exclusive economic zone set forth in article 56 of the Law of the Sea Convention. This includes its sovereign rights over the exploration and exploitation of natural resources and its jurisdiction over marine scientific research.⁵²

52 See Law of the Sea Convention, *supra* note 13, arts 56, 246; Francisco Orrego Vicuña, *The Exclusive Economic Zone*, (1989) at 106-108. With respect to the distinction between commercial exploration, marine scientific research and

In exercising their freedoms and rights in the zone, States must 'have due regard to the rights and duties of the coastal State.'⁵³ The rights that are the object of this 'due regard' duty under article 58 are those granted exclusively to the coastal state by article 56 (and the provisions to which article 56 refers); they do not include a political or military interest in avoiding the presence of the aircraft. These rights are the subject of the parallel duty of the coastal state under article 56(2) to 'have due regard to the rights and duties of other States' and to 'act in a manner compatible with the provisions of this Convention'; the freedoms and rights of all states under article 58 are the object of this duty.

Ships and aircraft also must 'comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with' the provisions regarding the exclusive economic zone; this would include, for example, a law regulating exploration and exploitation of natural resources, marine scientific research, or dumping.⁵⁴ However, unlike freedom of navigation by ships – which is subject in the exclusive economic zone to elaborate regulatory provisions set forth in the high seas regime and the environmental chapter of the Convention⁵⁵ – apart from general matters such as piracy, no provision of the Convention addresses regulation of freedom of overflight as such either on the high seas or in the exclusive economic zone,⁵⁶ much less authorizes the coastal state to adopt laws and regulations for this purpose in the zone.

other information gathering, see Bernard H Oxman, 'The Regime of Warships Under the United Nations Convention on the Law of the Sea' (1984) 24 *Va J Int'l L* 809, 844-47 an English adaptation of the author's analysis in (1982) 28 *Ann Fr Dr Int* 811 (hereinafter cited as Oxman, Warships).

53 Law of the Sea Convention, *supra* note 13, art 58(3).

54 *Ibid.* The practice of discharging fuel before landing for safety reasons would not appear to be 'dumping' for purposes of the Law of the Sea Convention: its definition of 'dumping' excludes 'the disposal of wastes or other matter incidental to, or derived from the normal operations of ... aircraft'. Law of the Sea Convention, *supra* note 13, arts 1(1)(5)(b)(i), 210, 216.

55 See Law of the Sea Convention, *supra* note 13, arts 58(2), 90-115, 211, 217-221.

56 Pursuant to arts 212 and 222, the state of registry of the aircraft adopts and enforces laws and regulations to control pollution from or through the atmosphere. The coastal state also has such competence in its internal waters, archipelagic waters and the territorial sea. However, pursuant to art 233, 'nothing in ss 5, 6 and 7 [of Part XII, which includes arts 212 and 222] affects the legal régime of straits.' Given the fact that there is no express reference to archipelagic waters or archipelagic sea lanes passage in any of Part XII, one would rely on the structure of the Convention to conclude that the same rule applies to archipelagic sea lanes passage as well. Moreover, art 235 provides that the 'provisions of

Insofar as the nature of overflight rights beyond the territorial sea is concerned, there is no difference between the provisions of the Law of the Sea Convention concerning the exclusive economic zone and those concerning the high seas beyond. Both refer to freedom of overflight.⁵⁷ Unlike the 1958 High Seas Convention, the 1982 Law of the Sea Convention contains no geographic definition of the high seas. Article 86 applies the high seas regime to all parts of the sea beyond the exclusive economic zone, but expressly states that it 'does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.' Freedom of overflight and other freedoms of all states in the exclusive economic zone are expressly identified in article 58(1) as 'the freedoms referred to in article 87.' Article 87 is the basic provision identifying the freedoms of the high seas. As this author indicated during the negotiation of the Convention,⁵⁸ one of the reasons the United States suggested this cross-reference to article 87 during the negotiations in the so-called 'Castaneda-Vindeness Group' regarding the provisions dealing with the status of the exclusive economic zone was to make clear that the nature of the freedoms preserved in the exclusive economic zone is qualitatively the same as on the high seas beyond and subject to international regulation in the same way, in particular with respect to the regulation

this Convention regarding the protection and preservation of the marine environment do not apply to any ... aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.'

57 Law of the Sea Convention, *supra* note 13, arts 58(1), 87.

58 See Bernard H Oxman, 'An Analysis of the Exclusive Economic Zone as formulated in the Informal Composite Negotiating Text', in Thomas A Clingan, ed, *Law of the Sea: State Practice in Zones of Special Jurisdiction*, (1979) (Proceedings of the Thirteenth Annual Conference of the Law of the Sea Institute) at 57, 68:

Art 87 is the basic article listing the freedoms of the high seas. Therefore, the cross-reference to art 87 establishes the qualitative identity of freedom of navigation, overflight and laying submarine cable and pipelines in the exclusive economic zone and on the high seas beyond. High seas law determines the meaning of art 58, subject of course to the express limitations on the application of that law within that article.

This cross reference to art 87 makes clear that treaties regulating these freedoms on the high seas apply in the same way to the exercise of these freedoms in the exclusive economic zone. In particular, the cross reference was intended to make clear that art 12 of the Chicago Convention on Civil Aviation applies in exactly the same way to freedom of overflight within the exclusive economic zone as it applies to freedom of overflight beyond the exclusive economic zone. The reference to the high seas in art 12 of the Chicago Convention should be read as a reference to freedom of overflight in the modern law of the sea.

of overflight under the Chicago Convention, including article 12 thereof. Moreover, apart from provisions dealing specifically with fisheries, article 58(2) incorporates by reference into the regime of the exclusive economic zone all the remaining provisions of the high seas regime 'in so far as they are not incompatible with' the provisions regarding the exclusive economic zone.

The question is not whether the exclusive economic zone is or is not high seas in some abstract sense. The question is whether the freedom of overflight in the exclusive economic zone is in principle the same freedom of overflight that obtains on the high seas beyond. The answer to that question is 'yes'. In effect, the received high seas freedom of overflight is preserved by the Law of the Sea Convention in its regimes of the exclusive economic zone and of the high seas. Accordingly, '... for the purposes of the Chicago Convention, its Annexes and other air law instruments, the EEZ should be deemed to have the same legal status as the high seas and any reference in these instruments to the high seas should be deemed to encompass the EEZ.'⁵⁹ '[T]he same right of freedom of navigation is enjoyed by aircraft over the EEZ as is enjoyed by aircraft over the high seas, which is the plain meaning of Articles 58 and 87 of UNCLOS. It would follow that, as a consequence of Articles 58 and 87 of UNCLOS, the Rules of the Air applying over the EEZ are to be identical with those applying over the high seas.'⁶⁰

59 ICAO Secretariat Study, *supra* note 46, para 11.12.

60 Report by the Rapporteur of the ICAO Council's Legal Committee (Mr AWG Kean, CBE), United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Air Law Instruments, para 33, Attachment to ICAO Doc C-WP/8077 (1985, mimeo), reproduced in (1987) 3 *NILOS YB* 262 (hereinafter cited as ICAO Rapporteur).

It is, therefore, beyond doubt (in your Rapporteur's opinion) that Art 58 of UNCLOS, by applying Art 87 to the right of overflight over the EEZ and using language characteristic of high seas rights, equates the EEZ with the high seas as regards freedom of overflight and is quite incompatible with the suggestion made in the comments of one State [Brazil] that 'an effort should be made in the context of the Chicago system to give the EEZ the same conditions as those applicable to land territory and territorial waters with respect to overflight, as provided for in Art 5 of the Chicago Convention (and in IASTA)'. Such a suggestion would, in your Rapporteur's view, require an amendment of UNCLOS.

Ibid, para 29. See Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 203 (Dordrecht/Boston: Martinus Nijhoff, 1989).

(ii) *Transit Passage of Straits*

Early in the informal negotiations that led to the Third UN Conference on the Law of the Sea, the United States, with the support of the Soviet Union and others, suggested the maintenance of a high seas corridor through straits used for international navigation for transit purposes. This approach raised concerns about regulation of activities other than transit of straits. In response to these concerns, the idea of a high seas corridor was dropped in favor of a regime of free transit, which ultimately evolved into the right of transit passage in articles drafted by an informal group convened by the United Kingdom and Fiji. However, the idea was retained that navigation and overflight in transit through straits would be subject, not to the conditions otherwise applicable in the territorial sea, but to conditions similar to those applicable beyond the territorial sea.

In particular, only international regulations (or, in the case of sea lanes and traffic separation schemes, internationally approved regulations) apply to the regulation of transit by ships and aircraft for pollution and safety purposes. Apart from the right of the straits state to regulate activities other than transit, proposals permitting straits states to adopt their own regulations were rejected. Thus, ships in transit passage must comply with generally accepted international regulations for safety at sea, including the International Regulations for Preventing Collisions at Sea, while aircraft in transit passage (apart from state aircraft) must observe the ICAO Rules of the Air.

This result follows from the analysis of the Chicago Convention itself. If, as previously discussed, the provisions of the Chicago Convention and related measures applicable only to flight over the territory of a state do not apply to transit passage of straits, what is left under the structure of the Convention are the international standards, in particular the rules 'relating to the flight and maneuver of aircraft ... established under this Convention' referred to in article 12. These are the Rules of the Air.⁶¹

In this connection, the British delegation, which was co-chair of the informal group that drafted the straits articles, stated in the relevant Conference Working Group that the relevant part of the Rules of the Air 'is that relating to the high seas.'⁶² In 1976, the United States stated

61 The Rules of the Air, while mandatory on the high seas, of course also may apply to flight over the territory of states that have not notified ICAO of differences under art 38.

62 See Satya N Nandan & David H Anderson, 'Straits Used for International Navigation: A Commentary on Part II of the United Nations Convention on the Law of the Sea 1982', (1989) *BYBIL* 159, 185 (hereinafter cited as Nandan & Anderson).

at the Conference that the 'Rules of the Air referred to are the ICAO rules as they apply to the high seas.'⁶³ This interpretative statement 'apparently received no objections.'⁶⁴

The provisions of the Chicago Convention and standards adopted thereunder regulating flight over the high seas are properly interpreted to apply in the same way to civil aircraft in transit passage of straits. In this context, it should be borne in mind that the Law of the Sea Convention adds a new obligation for state aircraft not explicitly contained in the Chicago Convention. They 'will normally comply with' the safety measures contained in the Rules of the Air.⁶⁵ Moreover, the provision of article 39(2) of the Law of the Sea Convention, to the effect that state aircraft 'will at all times operate with due regard for the safety of navigation' appears, at least as a purely textual matter, to impose a stricter obligation and have a broader object than that contained in article 3(d) of the Chicago Convention.

The reason that state aircraft are not invariably subject to the Rules of the Air, while all ships are required by the Law of the Sea Convention to comply with generally accepted international regulations, procedures and practices for safety at sea, relates in important respects to the distinct competencies and traditions of the International Maritime Organization (IMO) and ICAO.

IMO does not have regulatory powers comparable to the broad powers of the ICAO Council. Binding regulation generally emerges from treaties negotiated under IMO auspices. Where relevant, the particular needs of warships have traditionally been taken into account in this work. It was especially important for the Law of the Sea Convention to 'close the gap' in ratification of IMO safety conventions by requiring respect for the regulations contained therein that are 'generally accepted'. This obligation is not limited to straits and archipelagic waters.⁶⁶

63 4 Renate Platzöder, *The Third United Nations Conference on the Law of the Sea: Documents 1973-1982* (1983), 360.

64 Caminos, *supra* note 31, p 161, note 373. The statements were presumably designed to eliminate a possible argument that there is a *renvoi* in Rule 2.1.1 of Annex 2 to 'the rules published by the State having jurisdiction over the territory overflown.' See ICAO Rapporteur, *supra* note 56, para 16, concluding that such an application of Rule 2.1.1 'would defeat the apparent purpose of Art 39.3(a)' of the Law of the Sea Convention 'to produce uniformity over straits.'

65 Law of the Sea Convention, *supra* note 13, art 39(3)(a).

66 See Law of the Sea Convention, *supra* note 13, arts 21(4) (innocent passage), arts 39(2)(a) & 54 (transit passage and archipelagic sea lanes passage), arts 58(2) & 94(5) (freedom of navigation in the exclusive economic zone and on the high seas).

The Chicago Convention is very widely ratified. Under that Convention, ICAO has broad regulatory powers, especially with respect to overflight of the high seas, but those powers do not extend to military aircraft. For that reason, ICAO regulations need not be drafted to take into account the particular needs of military aircraft. Thus, there are problems, such as those associated with flight plans, flight control, and two-way communication, that make compliance with ICAO regulations in all circumstances difficult in the case of military aircraft.

One of the few amendments to the Law of the Sea Convention pressed to a formal vote was Spain's proposal to delete the word 'normally' so that state aircraft would be bound at all times to comply with the Rules of the Air. The proposal was defeated by a vote of 21 for, 55 against, and 60 abstentions.⁶⁷ In connection with its signature of the Convention (and maintained on ratification), Spain declared, "With regard to article 39, paragraph 3, it takes the word 'normally' to mean 'except in cases of *force majeure* or distress'." That is not what the text says. The absence of those words is especially significant in the particular context of article 39, which uses those very words of exception in another paragraph where that is what is meant.⁶⁸ '[T]his paragraph of the Declaration seems directed at modifying the overflight provisions of the transit passage régime; something which could not be accomplished throughout UNCLOS III.'⁶⁹

The Spanish and other concerned governments were well aware that the reason for the word 'normally' relates primarily to situations in which there is a need to provide air cover for transiting ships or a need to protect the security of the aircraft or the mission, determinations that the state undertaking the mission is alone competent

67 Even the abstentions have some negative implication. Rule 39, paragraph 1, of the Conference Rules of Procedure provides, 'Decisions of the Conference on all matters of substance ... shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in that session of the Conference.'

68 It is interesting that in the context of an article that uses 'shall' in all other contexts, the word 'will' is used in the context of the duty of state aircraft normally to comply with the safety measures in the Rules of the Air and to have due regard to the safety of navigation. The same distinction is to be found in art 3 of the Chicago Convention, which uses the word 'shall' in all other contexts, but the word 'will' in paragraph (d) in connection with the duty of state aircraft to have due regard for the safety of navigation of civil aircraft.

69 Caminos, *supra* note 31, p 229. Yturriaga replies, "The Spanish declaration does not try to delete the word 'normally' by the back door, but to give a *pro domo* interpretation of what can be considered as 'abnormal'," José A de Yturriaga, *Straits Used for International Navigation, A Spanish Perspective*, p 232 (Dordrecht/Boston: Martinus Nijhoff, 1991) (hereinafter cited as Yturriaga).

to make. This type of concern is also reflected more generally in article 302, which provides that 'nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security'.⁷⁰

(iii) *Archipelagic Sea Lanes Passage*

As previously noted, most of the relevant provisions governing transit passage of straits are either copied or incorporated by reference into the provisions regarding archipelagic sea lanes passage. For the same reasons discussed in connection with transit passage of straits, the provisions of the Chicago Convention and standards adopted thereunder regulating flight over the high seas are properly interpreted to apply in the same way to civil aircraft in archipelagic sea lanes passage. The rule that state aircraft 'will normally comply with' the safety measures contained in the Rules of the Air is among those incorporated by reference into the provisions regarding archipelagic sea lanes passage.⁷¹

(iv) *Result*

The result then is that the provisions of the Chicago Convention and related instruments applicable to the high seas, apply in the exclusive economic zone and to transit passage of straits and archipelagic sea lanes passage as they apply on the high seas.

VI. ACTIVITIES DURING TRANSIT OF STRAITS AND ARCHIPELAGIC WATERS

Although they would apply in any event, the 'principles of international law embodied in' the UN Charter regarding the threat or use of force are repeated and incorporated by reference into article 301 with respect to the exercise of all rights and performance of all duties under the Law of the Sea Convention,⁷² and in specific provisions as well, such as those regulating transit passage and archipelagic sea lanes passage;⁷³

70 Art 302 is analyzed by the author in Oxman, Warships, *supra* note 52, at 822.

71 Law of the Sea Convention, *supra* note 13, art 54.

72 Its implications are analyzed by the author in Oxman, Warships, *supra* note 52, at 814-815.

73 Law of the Sea Convention, *supra* note 13, arts 39(1)(b), 54. The inclusion of a reference to 'sovereignty' in addition to territorial integrity and political independence in this context (and art 19) would not appear to alter the substance. Surely, it could not be understood to establish an *a contrario* interpretation of the obligations of states in other areas or contexts.

they are also implicitly incorporated by provisions such as article 88, which reserves the high seas for 'peaceful purposes' and applies to the exclusive economic zone pursuant to article 58(2).⁷⁴

In his transmittal of the Law of the Sea Convention to the US Senate for its advice and consent, the President of the United States included a Commentary on the Convention (US Commentary). It contained the following statement regarding the provisions referred to in the previous paragraph:

None of these provisions creates new rights or obligations, imposes restraints upon military operations, or impairs the inherent right of self-defense, enshrined in article 51 of the United Nations Charter. More generally, military activities which are consistent with the principles of international law are not prohibited by these, or any other, provisions of the Convention.⁷⁵

Unlike the broader rights and freedoms of all states in the exclusive economic zone and the high seas, the right of transit passage and the right of archipelagic sea lanes passage are limited to the purpose of continuous and expeditious transit.⁷⁶ Ships and aircraft must proceed without delay.⁷⁷ They are required to 'refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.'⁷⁸

'Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of [the] Convention.'⁷⁹ The Convention accords foreign states no right to conduct activities in the territorial sea other than innocent passage, transit passage and archipelagic sea lanes passage.⁸⁰

What constitutes 'delay' and what constitutes the normal mode of continuous and expeditious transit for military aircraft depends upon the circumstances. Military aircraft may transit alone or in squadron

74 The author's analysis of the 'peaceful purposes' clause can be found in Oxman, Warships, *supra* note 70, at 829.

75 Commentary accompanying Message from the President of the United States transmitting the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI to the United States Senate for its advice and consent, Oct 7, 1994, Sen Treaty Doc 103-39, p 94 (1994), *reprinted in* 34 ILM 1441 (1995) (cited hereinafter as US Commentary).

76 Law of the Sea Convention, *supra* note 13, arts 38(2), 53(3).

77 Law of the Sea Convention, *supra* note 13, arts 39(1)(a), 54.

78 Law of the Sea Convention, *supra* note 13, arts 39(1)(b), 54.

79 Law of the Sea Convention, *supra* note 13, art 38(3).

80 The right to enter a port or other waters of a state in cases of danger or distress is governed by customary international law.

formation. Helicopters or fixed wing aircraft also may accompany warships in transit in a defensive mode. This is one reason why military overflight is not restricted to prescribed altitudes and why the air routes across archipelagic waters must be above the archipelagic sea lanes.⁸¹

It is in the interests of neither the transiting state nor the coastal state to present an unusually tempting target for third states or others. In principle, it is to be expected that naval and air forces in transit will take normal defensive precautions against attack. For security as well as navigation purposes, they may, for example, communicate by radio, use radar or sonar, and, where circumstances permit, travel in defensive formation and use defensive maneuvers. If ships and aircraft are traveling in a group for normal defensive purposes, total transit time will be limited by the slowest unit.

Yturriaga writes:

The flight of aircraft to or from its carrier cannot be considered as a 'normal mode of continuous and expeditious transit', apart from being forbidden under paragraph 1(b) of article 39. The text of paragraph 1(c) is not definitive as [to] what activities are incident to the normal mode of transit, but the appropriate interpretation would be one of 'reasonableness' under the circumstances.⁸²

For the launching and recovery of aircraft from its carrier to be 'forbidden under paragraph 1(b) or article 39', one must assume that it invariably constitutes a threat or use of force against the sovereignty, territorial integrity or political independence of the straits state. That is simply not true. These activities occur at sea all the time. Neither in straits nor in other waters do they constitute an unlawful threat or use of force as such.

There is of course no need to quarrel in the abstract with Yturriaga's assertion of a standard of 'reasonableness' for interpreting paragraph 1(c). The difficulty is his implicit factual assumption that launching and recovering aircraft is never a normal mode of continuous and expeditious transit. That assumption is not correct. Under Yturriaga's own proffered test, whether it is reasonable would depend on the circumstances.

The US Commentary on the Convention contains the following statement twice, once regarding transit passage and once regarding archipelagic sea lanes passage:

81 Law of the Sea Convention, *supra* note 13, art 53(1).

82 Yturriaga, *supra* note 69, p 224.

[S]ubmarines may transit submerged and military aircraft may overfly in combat formation and with normal equipment operation; surface warships may transit in a manner necessary for their security, including formation steaming and the launching and recovery of aircraft, where consistent with sound navigational practices.⁸³

The concluding clause of this statement should not be overlooked. The right to engage in activities incident to the normal mode of continuous and expeditious transit may be lawfully exercised only to the extent that geography permits⁸⁴ and to the extent consistent with the obligation of aircraft to have due regard for the safety of navigation⁸⁵ and the obligation of ships to comply with generally accepted international regulations, procedures and practices for safety at sea.⁸⁶ Aircraft must remain over water in the areas in which they enjoy a right of overflight under the Law of the Sea Convention, be it over the waters of the strait, including its approaches, in the case of transit passage, or in the air routes above designated sea lanes in the case of archipelagic sea lanes passage (or, in their absence with respect to the relevant route through archipelagic waters and the adjacent territorial sea, the routes normally used for international navigation).

Lawyers who analyze (and occasionally fret about) these matters in the abstract should consider the very real practical limitations on the exercise of rights.⁸⁷ In practice, geographic and safety constraints constitute significant limitations on the options available in straits.

83 US Commentary, *supra* note 75, p19 (transit passage) and p22 (archipelagic sea lanes passage).

84 In classes dealing with this subject, my students are fond of circulating the following reported US Navy transcript of a radio conversation off the coast of Newfoundland in October 1995:

AMERICANS: Please divert your course 15 degrees to the north to avoid a collision.

CANADIANS: Recommend you divert your course 15 degrees to the south to avoid collision.

AMERICANS: This is the captain of a US Navy ship. I say again, divert your course.

CANADIANS: No. I say again, you divert your course.

AMERICANS: This is the aircraft carrier USS Lincoln, the second largest ship in the United States Atlantic fleet. We are accompanied by three destroyers, three cruisers and numerous support vessels. I demand that you change your course 15 degrees north. That's one five degrees north, or counter measures will be undertaken to ensure the safety of this ship.

CANADIANS: This is a lighthouse. Your call.

85 Law of the Sea Convention, *supra* note 13, art 39(3)(a).

86 Law of the Sea Convention, *supra* note 13, art 39(2)(a).

87 They would do well to recall one of the classic understatements in naval history, 'A collision at sea can ruin your entire day'.

Straits are, after all, relatively narrow and there may be considerable shipping traffic both through and across the strait limiting the choices available to ships. In some busy straits, sea lanes and traffic separation schemes have been established for ships. Where there is a major city on the straits, there is likely to be a major airport in the vicinity; this requires particular care for the safety of aircraft using that airport. In a congested or narrow strait, it is particularly unlikely that we will see launching or recovery of fixed wing aircraft, be it as a matter of law or prudence.

Where archipelagic sea lanes run through congested or narrow straits between islands, the same practical limitations are likely to be present. It is in broad open areas, such as those where archipelagic sea lanes approach their maximum width of 50 miles, that activities such as launching and recovering fixed wing aircraft are most likely to be consistent with geographic and safety considerations, and most likely to be needed. It is reasonable to assume that it is largely—although clearly not exclusively with such areas in mind that such options are being kept open.

There is no provision for air routes above sea lanes in straits comparable to those over archipelagic sea lanes. The reason is that archipelagic waters may contain expanses of open water in which it was considered reasonable to limit the right of archipelagic sea lanes passage to a liberal, but nevertheless prescribed, horizontal area. In straits, sea lanes and traffic separation schemes are designated only for the classic purpose of ensuring safety of navigation by ships.⁸⁸ It should nevertheless be borne in mind that the duty to remain over the waters of the strait in which there is a right of transit passage, the duty of due regard for the safety of navigation, and the duty normally to comply with the ICAO Rules of the Air are likely to result in adherence to horizontal and vertical self-restraint in practice.

88 Straits states do have an option where geography and traffic patterns permit. They can restrict the breadth of the territorial sea in the strait so that 'there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.' In that case, the regime of straits would not apply; there would be freedom of navigation and overflight beyond the territorial sea, but only a right of innocent passage for ships within the territorial sea. Law of the Sea Convention, *supra* note 13, art 36. Attempting to use this approach as a means for escaping the need for approval of sea lanes by the competent international organization would, however, be of questionable validity. See *ibid*, arts 39(2)(a), 41(4), 44, 300. It is also questionable, in light of the provision for such sea lanes, whether in most instances it would be in the interests of the straits state itself to restrict its territorial sea because of largely hypothetical concerns regarding overflight of straits.

VII. ASSISTANCE

'Danger invites rescue. The cry of distress is the summons to relief.'⁸⁹ Article 18(2) of the Law of the Sea Convention, in the context of its 'continuous and expeditious' requirement for passage, expressly permits stopping and anchoring 'for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.'⁹⁰ While article 18(2) applies only to innocent passage, it is logical to regard such assistance as 'incident to' the 'normal model[] of continuous and expeditious' transit in the context of the regimes of transit passage and archipelagic sea lanes passage.⁹¹ Any other conclusion would be in tension with the traditions of protecting both mariners and aviators and, in context, would lead to the absurd result that rescue is expressly authorized in areas where a more restrictive innocent passage regime applies, namely the territorial sea outside most straits and archipelagic waters outside archipelagic sea lanes, but is not permitted (in textual terms, is not regarded as a normal incident of transit) in areas where a more liberal transit regime applies, namely straits and archipelagic sea lanes.⁹²

Although the innocent passage provisions do not include a right to overfly the territorial sea, article 18(2) may be plausibly interpreted to permit the use by a ship of all available persons, craft and equipment carried on board, including aircraft, necessary for the purpose of rendering assistance. Be that as it may, the provisions regarding transit passage and archipelagic sea lanes passage do include a right to overfly and therefore would logically be interpreted to include the rendering of assistance by ships or aircraft.

89 *Wagner v International Railway*, 232 NY 176, 133 NE 437 (1921) (New York Court of Appeals, Cardozo, J).

90 Law of the Sea Convention, *supra* note 13, art 18(2).

91 The rule is best regarded not as a grant of a new right, but as a specific application of the ancient duty to rescue at sea. See Law of the Sea Convention, *supra* note 13, art 98.

92 Caminos reaches the same conclusion, but would apparently base it on the *force majeure* or distress exception in art 38(1)(c). Caminos, *supra* note 31, p 148. That is certainly a plausible reading. My preference for regarding the rendering of assistance as 'incident to' the 'normal model[] of continuous and expeditious' transit is influenced in part by the general belief that rescue is properly regarded as incident to navigation at sea, and in part by the structure of art 18(2). That article not only establishes in the context of innocent passage that the rendering of assistance does not contravene the requirement that passage be continuous and expeditious, but adds the reference to such assistance after its reference to *force majeure* or distress, possibly implying a distinction between the two.

In addition, the United States Government has concluded that there is a right of assistance entry into foreign territorial seas (and archipelagic waters) independent of the rights of innocent passage, transit passage, and archipelagic sea lanes passage. Commanders of naval vessels are authorized to exercise this right where the location of the danger or distress is reasonably well known, but not to conduct searches. The operational commander of military aircraft is authorized to do so, without further guidance from higher authority in consultation with the Department of State, only if any delay in rendering assistance could be life-threatening. Accordingly to this policy, 'While the permission of the coastal State is not required, notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State.'⁹³

VIII. RIGHTS OF STRAITS STATES AND ARCHIPELAGIC STATES

Straits states and archipelagic states have the right to expect that ships and aircraft remain within the confines of the transit rights accorded them by the Law of the Sea Convention and respect the duties imposed by the Convention in connection with the exercise of those rights. They may enforce that right by diplomatic means or before a competent international tribunal. The question is one of other remedies.

Yturriaga addresses the question in the following way:

What would happen if passing aircraft do not proceed without delay over the strait or during its transit use force against the sovereignty, territorial integrity or political independence of the State bordering the strait, in violation of the principles of the UN Charter? Can the coastal State prevent such a passage? ... [A]ircraft engaged in such type of unlawful activities ... are not exercising the right of transit passage and any activity which is not an exercise of the right of transit passage through a strait remains subject to other application provisions of the Convention. If the transit of an aircraft does not fall under the conditions of transit passage pursuant to article 38 or the aircraft indulges in activities expressly forbidden by article 39, the aircraft will not enjoy the right of transit passage and the unlawful activities will be subject to other applicable provisions of the Convention. The coastal State may resort, by analogy, to article 25(1) in order to justify interfering with aircraft's non-transit passage.⁹⁴

93 Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry (1986), reproduced in AR Thomas & James C Duncan, eds, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 163 (analysis at pp 120-121 and note 35) (Newport, Rhode Island, USA: US Naval War College, 1999).

94 Yturriaga, *supra* note 69, p 222.

As to the use of force against the coastal state, as previously indicated, the matter is dealt with by the UN Charter and the inherent right of self-defense recognized by the Charter.⁹⁵ It should be clear, however, that transit of warships or military aircraft, alone or in squadrons or task forces, does not, in itself, give rise to any such right.

In the event that the vessel or aircraft were outside the area in which it enjoys a right of transit, the matter would be addressed in the same way as would be appropriate in any other part of the territory, territorial sea or archipelagic waters of a state, bearing in mind the immunities of warships and military aircraft. The absence of ambiguity is an important predicate for action in this connection. A relatively easy case is presented by an aircraft over land.

If it were objectively evident from its conduct that a vessel or aircraft was not present for the purpose of transit, again the matter would be addressed in the same way as would be appropriate in any other part of the territorial sea or archipelagic waters. The absence of ambiguity is an important predicate for action in this connection as well, again bearing in mind the immunities of warships and military aircraft. A relatively easy case is presented by dropping anti-government leaflets from an aircraft.⁹⁶

The underlying question concerns the consequences of non-compliance (or doubts regarding compliance) with the conditions for transit. The right of transit passage must not be 'impeded' and the right of archipelagic sea lanes passage must be 'unobstructed'.⁹⁷ Neither may be hampered or suspended.⁹⁸ It is true that article 25(1) permits the coastal state to 'take the necessary steps in its territorial sea to prevent passage which is not innocent'.⁹⁹ But that article applies only to innocent passage. There is no comparable provision in the articles dealing with transit passage or archipelagic sea lanes passage. This was deliberate. Caminos observes:

95 Hailbronner's invocation of 'preventive' self-defense is risky. It might be borne in mind that anticipatory self-defense is a double-edged sword, and that military and naval commanders are undoubtedly under standing orders to protect their units from attack. See Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea', (1983) 77 *AJIL* 490, 520 (hereinafter cited as Hailbronner).

96 Because such reactions have in fact occurred, it bears mentioning in this connection, quite apart from the rules contained in the new art 3 *bis* it is difficult to justify the use of deadly force in response to navigational error or distributing leaflets as necessary, proportional, or otherwise appropriate.

97 Law of the Sea Convention, *supra* note 13, arts 38(1), 53(3).

98 Law of the Sea Convention, *supra* note 13, arts 44, 54.

99 Law of the Sea Convention, *supra* note 13, art 25(1).

The right of transit passage defined in Article 38 ... is separate and distinct from the duties listed in Article 39. ... A breach of a duty under Article 39 simply creates international responsibility in the flag State without granting strait States the unilateral right to determine violations, or to deny the right of transit passage based on such determinations. ... This approach is completely different from that followed in Article 25 ..., which expressly grants the coastal State the right to prevent passage which is not innocent. ... [A] violation of the provisions of one article [39] does not correspond to the loss of a right under another article [38].¹⁰⁰

Hailbronner reaches the same conclusion, adding, "The Convention neither grants coastal states the power to define 'the normal modes of continuous and expeditious transit' nor allows any interference with transiting aircraft."¹⁰¹

In addressing an issue of this sort, it is particularly important to bear in mind the rule of good faith set forth in article 300 of the Law of the Sea Convention and in article 31(1) of the Vienna Convention on the Law of Treaties. Thus, for example, in textual terms, the question can be posed simplistically as one concerning the effect of the words 'in accordance with this Part' in the clause defining transit passage as 'the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait' and in the equivalent definition of archipelagic sea lanes passage.¹⁰² From this, one presumes that even a first-year law student could construct the syllogism that any vessel or aircraft that does not comply with any obligation no longer comes within the definition of the transit right, and the coastal state is free to deal with its unauthorized presence in the same way as with any other unauthorized presence in its waters. A similar game could be played in reverse with the sovereignty of the coastal states, which 'is exercised subject to this Convention' or parts thereof.¹⁰³

This is not a reasonable interpretation of the transit passage and archipelagic sea lanes passage regimes in context. Unilateral enforcement by the coastal state of the conditions for transit or its own interpretation thereof was simply not contemplated or authorized except where expressly permitted. This is particularly evident when we turn to the question of regulation and enforcement of regulations.

100 Caminos, *supra* note 31, pp 149-50.

101 Hailbronner, *supra* note 95, (1983) 77 *AJIL* p 490, 520.

102 Law of the Sea Convention, *supra* note 13, arts 38(2), 53(3).

103 Law of the Sea Convention, *supra* note 13, arts 2(3), 34(2), 49(3). Indeed, the same student could have a field day with the effects on coastal states and other states of comparable cross-references to limitations and obligations elsewhere in the Convention.

While the coastal state enjoys significant unilateral powers to regulate innocent passage,¹⁰⁴ that is not the case with respect to transit passage or archipelagic sea lanes passage. In the case of 'safety of navigation and the regulation of maritime traffic', its regulatory powers are limited to what is 'provided in article 41', namely establishing sea lanes and traffic separation schemes to promote the safe passage of ships, which must be adopted by the competent international organization.¹⁰⁵ (The same system applies to the designation of archipelagic sea lanes and the air routes thereabove).¹⁰⁶ Pollution control regulations are limited to those 'giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait'.¹⁰⁷

The exercise of enforcement powers by the coastal states is limited to foreign ships not entitled to sovereign immunity which have committed violations of such safety or pollution regulations 'causing or threatening major damage to the marine environment of the straits'.¹⁰⁸ While the regime of innocent passage contemplates the right to expel warships that violate relevant regulations,¹⁰⁹ there is no such provision in the case of transit passage or archipelagic sea lanes passage. Instead, in the very article dealing with straits state laws and regulations, express provision is made for the international responsibility of the flag state of a ship or the state of registry of an aircraft entitled to sovereign immunity for violation of provisions of the Convention or such laws and regulations that result in loss or damage to the coastal state.¹¹⁰ While Spain and others did not succeed in imposing strict liability in this context, article 304 specifies that the Convention's provisions on responsibility and liability 'are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law'.¹¹¹

In sum, Yturriaga is correct when he concludes regarding the Law of the Sea Convention, 'States bordering straits are not empowered to adopt laws and regulations in respect of air navigation, or to designate air corridors and prescribe air separation schemes'.¹¹² He must ac-

104 Law of the Sea Convention, *supra* note 13, arts 21-22, 211(4).

105 Law of the Sea Convention, *supra* note 13, art 42(1)(a).

106 Law of the Sea Convention, *supra* note 13, art 53.

107 Law of the Sea Convention, *supra* note 13, arts 42(1)(b), 54.

108 Law of the Sea Convention, *supra* note 13, art 233. This also should be regarded as applicable to archipelagic sea lanes passage. See *supra* note 56.

109 Law of the Sea Convention, *supra* note 13, art 30.

110 Law of the Sea Convention, *supra* note 13, arts 42(5), 54.

111 See Yturriaga, *supra* note 69, pp 143, 234.

112 Yturriaga, *supra* note 69, p 222.

cordingly look elsewhere for the legal basis for the Spanish declaration upon signature of the Convention in 1989 (maintained upon ratification), which provides as follows:

It is the Spanish Government's interpretation that the régime established in Part III of the Convention is compatible with the right of the coastal State to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft.

He looks to the Chicago Convention, and to the application of its provisions regarding territorial waters to straits with respect to transit passage by aircraft. As previously discussed, it is not appropriate to interpret the reference to 'territorial waters' in the Chicago Convention in this way. The substance of Spain's declaration 'seems incompatible with Article 39(3)(a) of the 1982 Convention, which requires, in part, that civil aircraft in transit passage 'observe the Rules of the Air established by the International Civil Aviation Organization.'¹¹³

As stated in the ICAO Secretariat Study:

[T]he States bordering a strait cannot file a difference to Annex 2 – Rules of the Air – under Article 38 of the Chicago Convention with respect to the airspace over the straits. ... The UN Convention on the Law of the Sea *de facto*, without any need for an amendment of the Chicago Convention, would lead to an extension of the ultimate legislative jurisdiction of the ICAO Council [under Article 12 of the Chicago Convention] with respect to the Rules of the Air also over the airspace above straits used for international navigation.¹¹⁴

[I]n no circumstances can the States bordering such straits suspend or limit the right of transit passage, nor can they require the application of their own rules of the air.¹¹⁵

113 Caminos, *supra* note 31, p 229.

114 ICAO Secretariat Study, *supra* note 46, para 9.7. 'Our Rapporteur agrees with para 9.7 of the Secretariat's study that the reference is to Annex 2 as adopted and amended by the ICAO Council, without taking account of differences filed by contracting States under Art 38 of the Chicago Convention.' ICAO Rapporteur, *supra* note 60, para 15.

115 ICAO Secretariat Study, *supra* note 46, paras 9.7, 9.13.

The right of transit passage has certain consequences for foreign civil aircraft:

- (a) In the case of non-scheduled flight, ... the coastal State will be unable to require landing, to prescribe routes or to insist on special permission, as it otherwise could do under Art 5 [of the Chicago Convention];
- (b) Similarly, in the case of scheduled air services such aircraft will be able to exercise the right of transit without the special permission or authorisation required by Art 6 of the Chicago Convention. In such cases it will be irrelevant whether the coastal State has given permission under an air services agreement or under the International Air Services Transit Agreement or otherwise.

IX. MONITORING RADIO FREQUENCIES AND AIR TRAFFIC CONTROL

Article 39(3)(b) of the Law of the Sea Convention provides that aircraft in transit passage or archipelagic sea lanes passage¹¹⁶ shall 'at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.'¹¹⁷ The history of this provision relates to military overflight of straits and archipelagic waters. The provisions in article 39(1)(a) that state aircraft 'will normally comply with' the Rules of the Air and 'will at all times operate with due regard for the safety of navigation' do not expressly address the issue of radio monitoring and communications in those situations in which military aircraft are unable to comply with the Rules of the Air. Some states proposed a requirement of two-way communication with air traffic controllers. These proposals were not accepted because of concerns regarding the security of military aircraft or their mission in certain situations.

What emerged was an accommodation that requires state aircraft to listen at all times, but not necessarily to speak. Insofar as state aircraft are concerned, this provision does not conflict with the Chicago Convention, as that Convention does not apply to overflight by state aircraft.

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- (c) Because Art 44 of UNCLOS provides that the right of transit passage cannot be suspended, it cannot be affected by ... provisions [of other conventions or agreements] for suspension, such as Art 89 of the Chicago Convention ('War and emergency conditions'), Art 1.1 of IASTA, and similar provisions of air services agreements.

- (d) The right of the coastal State under Art 9 of the Chicago Convention to create restricted or prohibited areas over its territory (including its territorial sea) for reasons of military necessity or public safety will not be exercisable so as to restrict or prohibit transit passage ..., nor will the right temporarily to restrict or prohibit flying over the whole or part of its territory in exceptional circumstances or during an emergency or in the interest of public safety.

ICAO Rapporteur, *supra* note 60, para 13. The result for overflight by state aircraft, to which the Chicago Convention does not apply and which are not bound to respect the Rules of the Air under the Law of the Sea Convention in all cases, is *a fortiori* no less restrictive.

116 Law of the Sea Convention, *supra* note 13, art 54.

117 The expression 'internationally designated air traffic control authority' could, in the context of the Chicago Convention, mean only that the authority is listed in the appropriate Regional Air Navigation Plan approved by the Council of ICAO. The 'appropriate international distress radio frequency' ... is the VHF emergency frequency 121.5MHz referred to in Annex 10 – Aeronautical Telecommunications to the Chicago Convention as well as in other Annexes.

ICAO Secretariat Study, *supra* note 46, para 9.11; Milde, *supra* note 46, 187.

Notwithstanding its history, as drafted the radio monitoring provision applies to all aircraft, not just to state aircraft. For this reason, a question has arisen regarding the compatibility of this provision with regulations under the Chicago Convention applicable to civil aircraft.¹¹⁸

The 1984 ICAO Secretariat Study states in this regard:

With respect to the duty to monitor the ATC frequency and the appropriate international distress radio frequency, the UN Convention formulates this duty as an alternative. ... It is submitted that the UN Convention in this respect contains an error ... which has not been corrected in spite of ICAO notification to the UN Secretariat and to the Drafting Committee of the Conference. In fact, ... both these frequencies have to be monitored at all times [citing Standard 3.6.5.1 in Annex 2 – Rules of the Air and Standard 5.2.2.1.1.1 in Annex 10 – Aeronautical Telecommunications, Vol II]. ... the word 'or' in the Convention should have read 'and'; in view of the delicate overall compromise on the issues of straits, the Conference was apparently reluctant to make any, however minor, textual changes in this respect. In practice this matter will be of minor importance and does not represent a real conflict; the ICAO Standards are *lex specialis* which in practical application will be complied with in spite of the general broad terms of the Convention which, in any case, are not excluding or prohibiting the compliance with more stringent standards.¹¹⁹

Nandan and Anderson, who are well informed about the negotiation and drafting of the provisions of the Law of the Sea Convention regarding straits and archipelagoes, comment as follows:

It may well be true that those standards [cited in the ICAO Secretariat Study] will always be complied with in practice; however, Article 39(3) is also a *lex specialis* for the overflight of straits by aircraft of all types and it should not be thought to contain errors.¹²⁰

In this connection, the ICAO Secretariat Study also states:

Since the duty to maintain continuous listening watch of the ATC frequency applies, under Annex 2, only to controlled flights, it must be concluded that in view of Article 39, paragraph 3 of the UN Convention no uncontrolled flights are contemplated for transit passage over straits used for international navigation.¹²¹

118 That question in turn poses at least a theoretical issue regarding state aircraft under the Law of the Sea Convention because it provides that they 'will normally comply with' the Rules of the Air.

119 ICAO Secretariat Study, *supra* note 46, para 9.12.

120 Nandan & Anderson, *supra* note 62, (1989) *BYBIL* 186. In this connection, an ICAO Report draws attention "to the comments of the Netherlands, which do not agree with the Secretariat's belief that UNCLOS is in error, or that 'it is a firmly established practice that the aircraft must monitor the international emergency frequency'." ICAO Rapporteur, *supra* note 60, para 19.

121 ICAO Secretariat Study, *supra* note 46, para 9.10.

This conclusion is open to doubt, in part because article 39(3)(b) provides an alternative.¹²² Be that as it may, the reasoning presumably applies only to civil aircraft. In this connection it should be borne in mind that Standard 3.6.5.1 of Annex 2 – Rules of the Air requires that ‘an aircraft operated as a controlled flight shall maintain continuous listening watch on the appropriate radio frequency of, and establish two-way communication as necessary with, the appropriate air traffic control unit ...’ Both the text and the history of the Law of the Sea Convention make clear that an obligation to operate only as a controlled flight and to maintain two-way communication ‘as necessary’ with an air traffic control unit was not imposed on state aircraft. In the particular context of straits and archipelagic sea lanes, it might be considered more broadly whether it is prudent to take an approach that might encourage state aircraft to exercise their option not to comply with ICAO Rules.

X. SETTLEMENT OF DISPUTES

The application of the compulsory dispute settlement provisions of the Law of the Sea Convention to overflight by military aircraft requires consideration of several provisions. In principle, pursuant to article 286, all disputes concerning the interpretation and application of the Convention are subject to compulsory arbitration or adjudication. Moreover, disputes regarding the exercise by a coastal state of its sovereign rights or jurisdiction are not excluded by article 297 from compulsory arbitration or adjudication where they concern freedoms and rights of navigation or overflight, or law enforcement activities in relation thereto.

However, article 298(1)(b) allows a state to make a declaration excluding ‘disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 [coastal state rights regarding marine scientific research] or 3 [coastal state rights regarding living resources in the exclusive economic zone]’. In addition, article 298(1)(c) permits a declaration excluding disputes before the UN Security Council. A fair number of parties have made such declarations, but many have not.

It is possible therefore that an arbitral or judicial tribunal would have compulsory jurisdiction under the Law of the Sea Convention

¹²² See George W Ash, ‘1982 Convention on the Law of the Sea – Its Impact on Air Law’, [1987] *Air Force L Rev* 35, 47.

over a dispute concerning overflight by civil aircraft or, where the states concerned have not filed declarations excluding such a dispute, by military aircraft. However, under articles 281 and 282, the dispute settlement provisions of the Law of the Sea Convention are subordinated to any agreement between the parties to settle the dispute by other means, and in particular under article 282 to any agreement between the parties according compulsory jurisdiction to a forum empowered to render a binding decision. This raises two questions regarding the dispute settlement provisions of the Chicago Convention:

- 1) Do they apply to overflight by military aircraft?
- 2) Where there are substantial legal and factual issues in common under both Conventions, to what extent, if any, would a dispute relating to the interpretation or application of the Chicago Convention and subject to its dispute settlement procedures be regarded as the same as a dispute concerning the interpretation or application of the Law of the Sea Convention for purposes of articles 281 and 282?

As to the first question, paragraph (a) of article 3 provides that the Chicago Convention shall not be applicable to state aircraft. Paragraphs (c) and (d) of that article, however, contain specific rules regarding state aircraft. The obvious interpretation is that the word 'Convention' in article 3(a) means all the other operative articles of the Convention, including the dispute settlement provisions. There are doubtless others. The question of actions taken against civil aircraft (by military aircraft or otherwise) is yet another matter.

Although the incorporation by reference of the Rules of the Air into the transit passage regime of the Law of the Sea Convention is unusually explicit, the second question also arises in the context of the many direct and indirect references to international standards, rules, regulations and procedures contained in IMO conventions regarding matters such as navigation safety and prevention of pollution. IMO conventions also contain dispute settlement provisions. It is unclear what conclusions would be reached where, for example, an action is brought under the Law of the Sea Convention, the question is whether an aircraft in transit passage complied with the Rules of the Air and, if not, the legal consequences of the violation, and the respondent objects to jurisdiction on the grounds that both states, as parties to the Chicago Convention, have agreed on an alternative forum for adjudication of the dispute.¹²³

123 See Bernard H Oxman, 'Complementary Agreements and Compulsory Jurisdiction,' (2001) 95 *AJIL* 277, 301.

XI. CONCLUSION

The right of all aircraft, including military aircraft, to exercise the right of transit passage over straits and archipelagic sea lanes passage is clearly established by the Law of the Sea Convention. Viewed in historical context, neither right is new. Rather, it preserves, with important limitations, the freedom of navigation and overflight over the high seas that obtained in most of the affected waters with a classic three-mile territorial sea measured from classic baselines. It is not an intrusion into the sovereignty of the coastal state over its internal waters, archipelagic waters, or territorial sea, but rather a condition intended to protect and preserve the global communications rights of all states, especially in view of the extensions of that sovereignty that are recognized by the Convention.

The fear of a greater risk of armed attack in this context is unjustified. The right accorded is carefully confined to the need: transit. The prohibition on the use or threat of force, the right of self-defense and the powers of the UN Security Council as provided in the UN Charter and international law apply at sea and on land.¹²⁴ The speed, range and armaments of modern military aircraft are such that slight differences in their proximity to the coast may not be significant from a defense point of view. The right of individual self-defense of the coastal state is unaffected. Its right of collective self-defense is, in many circumstances, itself dependent upon the mobility of forces that might come to its aid. Similarly, while the UN Security Council may have the legal power to require states to permit forces carrying out its decisions to transit their territory,¹²⁵ in practice the ability of the Security Council to carry out its collective security functions is itself dependent upon and enhanced by the mobility of warships and military aircraft under the Law of the Sea Convention.

The transiting forces of a state (like its other facilities and nationals abroad) are of course subject to attack by a third state or terrorists. However, the fact that ships and aircraft in transit are permitted (indeed expected) to take normal defensive precautions, that such an attack would also constitute a violation of the sovereignty of the coastal state, and that such an attack might well impair the transit rights of other states reduces the risk of such an eventuality.

124 A state intent on using force in the territory of another state either believes it has the right to do so or is prepared to ignore its fundamental obligations under the UN Charter; in either case the sovereignty of the latter state over waters off its coast is unlikely to be regarded as an impediment.

125 See UN Charter, arts 25, 39, 41, 42, 48, 49.

The fear of involvement in disputes that do not concern the coastal state is misplaced. If anything, the rights of transit recognized by the Law of the Sea Convention permit the coastal state to distance itself from the ultimate mission of the forces in transit. It is irrelevant. Because the coastal state has no right to interfere with transit, it can more easily resist both foreign and domestic pressures to do so, and avoid or more easily deflect both foreign and domestic complaints.¹²⁶

Safety is of course in the interests of all. The fact that state aircraft are only 'normally' obliged to respect the safety measures in the Rules of the Air is a response to specific problems, not an invitation to ignore safety: state aircraft must 'at all times' operate with due regard for the safety of navigation. Given the elaborate system for command and control of military aircraft, it is to be expected that the requirement 'normally' to respect the safety measures in the Rules of the Air will be reflected in the general guidance and enforced in the specific operational orders under which those aircraft operate.

The law of the sea and the law of the air, to a significant degree, developed separately from each other. Each has its own specialists. Each is now based on a very widely ratified convention. There are doubtless many details of harmonization, especially with respect to civil aircraft, that remain to be thought through and given regulatory form by ICAO and others.

Coordinating the interaction between different fields of law is one of the more interesting things that lawyers do. It may be hoped that this study in some measure facilitates the process, or at least enlivens it.

126 For example, the fact that flight plans and two-way radio communication are not required in all cases presumably made it easier for the Spanish Government some years ago to distance itself from the overflight by US military aircraft of the Strait of Gibraltar en route to a mission over Libya.

APPENDIX

Selected Provisions of the United Nations Convention on the Law of the Sea

Preamble

The States Parties to this Convention,

...

Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

...

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,

Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

Have agreed as follows:

Part II

Territorial Sea and Contiguous Zone

Article 2

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 4

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 8

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Article 17

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Part III

Straits used for International Navigation

Article 34

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.
2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Article 35

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing an internal waters areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas;
or

- (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

Article 36

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply.

Section 2. Transit Passage

Article 37

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Article 38

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.
2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.
3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 39

1. Ships and aircraft, while exercising the right of transit passage, shall:
 - (a) proceed without delay through or over the strait;
 - (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

- (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
 - (d) comply with other relevant provisions of this Part.
- 2. Ships in transit passage shall:
 - (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
 - (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.
- 3. Aircraft in transit passage shall:
 - (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
 - (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Article 40

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

Article 41

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.
2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.
3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.
4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.
5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall co-operate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic schemes designated or prescribed by them on charts to which due publicity shall be given.
7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 42

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
 - (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
 - (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
 - (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.
2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.
3. States bordering straits shall give due publicity to all such laws and regulations.
4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.
5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Article 43

User States and States bordering a strait should by agreement co-operate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

Article 44

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

Section 3. Innocent Passage

Article 45

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:
 - (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
 - (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.
2. There shall be no suspension of innocent passage through such straits.

Part IV

Archipelagic States

Article 46

For the purposes of this Convention:

- (a) 'archipelagic State' means a State constituted wholly by one or more archipelagos and may include other islands;
- (b) 'archipelago' means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 47

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.
3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.
5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.
6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

Article 48

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

Article 49

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.
2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.
3. This sovereignty is exercised subject to this Part.
4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

Article 50

Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11.

Article 52

1. Subject to article 53 and without prejudice to article 50, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, section 3.
2. The archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Article 53

1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.
3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious, and unobstructed

transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

4. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.
5. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.
6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.
8. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.
9. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them.
10. The archipelagic State shall clearly indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.
11. Ships in archipelagic sea lanes passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.
12. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Article 54

Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage.

Part V

Exclusive Economic Zone

Article 55

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which

the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI [Continental Shelf].

Article 57

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions

of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Article 59

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Part VII

High Seas

Article 86

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 87

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and landlocked States:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI [Continental Shelf];
 - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - (e) freedom of fishing, subject to the conditions laid down in section 2 [Living Resources];
 - (f) freedom of scientific research, subject to Parts VI and XIII [Marine Scientific Research].
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area [deep seabed mining].

Article 88

The high seas shall be reserved for peaceful purposes.

Article 89

No State may validly purport to subject any part of the high seas to its sovereignty.

Article 98

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Article 101

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ...

Article 103

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 105

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 110

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
 - (a) the ship is engaged in piracy;
 - (b) the ship is engaged in the slave trade;
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
 - (d) the ship is without nationality; or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

Part XII

Protection and Preservation of the Marine Environment

Article 192

States have the obligation to protect and preserve the marine environment.

Section 5. International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment

Article 212

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
3. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution.

Section 6. Enforcement

Article 222

States shall enforce, within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.

Section 7. Safeguards

Article 233

Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.

Article 236

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

Part XV
Settlement of Disputes
Section 1. General Provisions

Article 281

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

Article 282

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

Section 2. Compulsory Procedures Entailing a Binding Decision

Article 286

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 - (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
 - (b) the International Court of Justice;
 - (c) an arbitral tribunal constituted in accordance with Annex VII;
 - (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

Section 3. Limitations and Exceptions to Applicability of Section 2

Article 297

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
 - (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
 - (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal States in conformity with this Convention and other rules of international law not incompatible with this Convention; or
 - (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

Article 298

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
 - (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, ...
 - (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297,

paragraph 2 [coastal state rights regarding marine scientific research] or 3 [coastal state rights regarding living resources in the exclusive economic zone];

- (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.
3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

Part XVI

General Provisions

Article 300

States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

Article 301

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Article 302

Without prejudice to the right of a State Party to resort to the procedures for the settlement of disputes provided for in this Convention, nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.

Article 304

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

Part XVII

Final Provisions

Article 309

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

Article 310

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

Article 311

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.